(2)

NO. 90-889

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

WILLIAM "SKY" KING,

Petitioner,

v.

ST. VINCENT'S HOSPITAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

*HARRY L. HOPKINS
MORRIS WADE RICHARDSON

Lange, Simpson, Robinson & Somerville
1700 First Alabama Bank Building
Birmingham, Alabama 35203-3272
Telephone (205) 250-5000

**Counsel of Record*

QUESTION PRESENTED

Whether under 38 U.S.C. § 2024(d) an employee/reservist has an absolute right, on demand, to an extended leave of absence from his civilian employment, without regard to the length of the leave, the timing of the demand, or any other legitimate needs of his/her employer.

PARTIES TO THE PROCEEDING

The parties to the proceeding are correctly stated in the Petition. There is no parent or subsidiary company to be listed on behalf of St. Vincent's Hospital.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES — (Continued)

STATUTE INVOLVED

38 U.S.C. § 2024(d) (1982) of the Veterans' Reemployment Rights Act provides in pertinent part:

> Any employee . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. . . .

STATEMENT OF THE CASE

St. Vincent's Hospital is satisfied with the facts as presented in the Court of Appeals and district court memorandum opinions. Pet. App. 1a-22a. St. Vincent's brought this action against William "Sky" King pursuant to 28 U.S.C. § 2201, seeking a declaration that King's request for a three-year leave of absence to serve as State Command Sergeant Major in the Alabama National Guard was unreasonable and that St. Vincent's did not violate the Veterans'

Reemployment Rights Act, with amendments, in denying King's leave request. St. Vincent's further sought a declaration that King had no right to reemployment by St. Vincent's under the Act upon completion of his military service. On April 22, 1989, the district court, based upon stipulated facts, held that the three-year leave request was *per se* unreasonable and entered judgment in favor of St. Vincent's Hospital. The United States Court of Appeals for the Eleventh Circuit affirmed on May 22, 1990, concluding that "even if we should find that the trial court erred in finding a three-year leave *per se* unreasonable, we would nevertheless hold that on the facts of this case, considering the factors outlined in *Gulf States*, the judgment of the trial court should be affirmed." Pet. App. 11a.

REASONS FOR DENYING THE WRIT

1. There is no conflict among the Courts of Appeals on the same matter.

The Solicitor General, on behalf of William "Sky" King, has petitioned this Court for a writ of certiorari advancing as the basis for the granting of the writ a conflict among the Courts of Appeals in the application of reemployment rights of employee reservists under Section 2024(d).[1] The Solicitor asserts that the decision of the Fourth Circuit Court of Appeals in *Kolkhorst v. Tilghman*, 897 F.2d 1282 (4th Cir. 1990), directly conflicts with the decision of the Eleventh Circuit

[1]These rights are more accurately called leave-of-absence rights rather than reemployment rights. S. Rep. No. 1672, 86th Cong., 2d Sess. 2 *reprinted in* 1960 U.S. Code Cong. & Admin. News 3077, 3077.

Court of Appeals in this case.[2] In addition, the Solicitor insists that the "reasonableness" requirement for extended leave requests misconstrues the language of 2024(d) and substantially curtails the protection afforded reservists by the Veterans' Reemployment Rights Act ("Act"). Pet. 7-8. The *Kolkhorst* decision does not conflict with the "reasonableness" requirement applied by the Eleventh Circuit and it does not conflict with other Circuits in the application of 2024(d) to employee reservist extended leave requests.[3]

Kolkhorst was a police officer with the Baltimore City Police Department. The Department had an internal policy limiting to one hundred the number of police officers (other than new hires) who could serve as active reservists. Kolkhorst, at the time he joined the Department, was a member of the Marine Corps Individual Ready Reserve and had no regular monthly or annual training obligations. After joining the Department, Kolkhorst asked for permission to join a Selected Marine Corps Reserve unit which would require him to attend monthly and annual training. His request was denied pending an opening in the Department's

[2]The Solicitor suggests that the Fourth Circuit decision also conflicts with the Third Circuit decision in *Eidukonis v. Southeastern Pennsylvania Transportation Auth.*, 873 F.2d 688 (3d Cir. 1989); the Eleventh Circuit's earlier decision in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987); the Fifth Circuit's decision in *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981); language in the Sixth Circuit decision in *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245 (3d Cir. 1989) and language in the Tenth Circuit decision in *Sawyer v. Swift & Co.*, 836 F.2d 1257 (10th Cir. 1988). Pet. 18.

[3]The district court in *Kolkhorst* applied the Eleventh Circuit's *Gulf States* "reasonableness" analysis in determining that the plaintiff's leave request was protected under the Act. *Kolkhorst v. Robinson*, 131 L.R.R.M. (BNA) 2671, 2673 (D. Md. 1988), *aff'd*, 897 F.2d 1282 (4th Cir. 1990). And, the Fourth Circuit concluded that "if we were to apply a reasonableness standard under Section 2024(d), we would find that Kolkhorst's request for leave was entirely reasonable, and that the Department's arbitrary policy was not." 897 F.2d at 1287.

reservist list. Notwithstanding the denial, Kolkhorst joined a Selected Reserve unit and trained on weekends, arranging for leaves of absence with his immediate superiors. Upon being ordered to the annual two week summer training, Kolkhorst requested a leave of absence. His request was denied and after an investigation by the Department into his reserve status, Kolkhorst was ordered by the Department to remove himself from the Selected Reserves.

The Fourth Circuit Court of Appeals affirmed the district court's judgment[4] in favor of Kolkhorst holding that the Police Department's actions in establishing a quota for reservists and denying Kolkhorst's leave request violated the nondiscrimination provisions of 38 U.S.C. § 2021(b)(3) (1982). 897 F.2d at 1283. The Court held "that the Department's official reservist policy, which clearly precipitated the unlawful measures taken by the Department . . . , conflicts directly with the language and purpose of Section 2021(b)(3), and cannot be countenanced thereunder."[5] Regarding Kolkhorst's two week leave request, the Court opined "We do not believe that reasonableness is required under Section 2024(d)" . . . and "the reasonableness standards that have been imposed by other courts are contrary to the purpose of

[4]The district court in considering Kolkhorst's 2024(d) claim stated that "[a]lthough Section 2024(d) by its terms provides for no exceptions, Courts have used a rule of reason as the lubricant necessary to make the statutory machinery function." 131 L.R.R.M. (BNA) at 2673. Concluding that the approach taken by the Eleventh Circuit in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987), was the correct one, the district court declared that "the Department's one hundred person limit on the number of officers who may be active reservists [was] unlawful and direct[ed] the Department to grant plaintiff's request that he be permitted to join a Marine Corps Reserve Unit." *Id.*

[5]897 F.2d at 1285. The Solicitor does not contend that St. Vincent's denial of King's three year leave request violated 2021(b)(3). Pet. 21 n.16 ("Indeed, the employer's action may well have been valid under [this] section.").

Section 2024(d) to allow reservists to train with their military units without suffering prejudice or any adverse action from their employers." 897 F.2d at 1286. The Fourth Circuit's discussion of the "reasonableness" inquiry under 2024(d) was not warranted by the facts. The principal holding was that the Department's quota system violated 2021(b)(3) and there was no need for the Court to articulate anything further. Even though the Fourth Circuit strayed unnecessarily from section 2021(b)(3), it promptly returned to the heart of the case when it noted that "the Department does not even consider the reasonableness of an employee's request for leave if the employee is not one of the one hundred persons eligible for reservist training." *Id.* at 1287.

Kolkhorst was requesting leave for the annual two week training which 2024(d) was enacted to allow. There is no reasonableness requirement for such a request and no court has ever held that there is such a requirement.[6] Every Circuit Court of Appeals that has applied a reasonableness standard to leave requests under 2024(d) has done so in the context of extended leave requests not a part of routine service in the reserves.[7] Thus, the Fourth Circuit's observation that no "reasonableness" standard applied to Kolkhorst's request is

[6]"Under § 2024(d), an employer is required to grant a leave of absence for Guard training if the period of training is less than three consecutive months." *Crank v. ATR, Inc.*, 133 L.R.R.M. (BNA) 3043, 3044 (E.D. Ky. 1990).

[7]In *Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688 (3d Cir. 1989), the Third Circuit found a reservist's request of a twenty-six day extension of a one hundred and forty day leave to be unreasonable under the circumstances. The Eleventh Circuit approved a one year leave request to participate in a licensed practical nurse training program in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987), finding that the request was reasonable. And in *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981), the Fifth Circuit disapproved the extension of a fifty day leave for an additional one hundred and forty seven days.

entirely correct and consistent with every other court's analysis of the same matter. The Solicitor contends that the language of 2024(d) does not place any "reasonableness" limitation on extended leave requests under the Act. Referencing the Fifth Circuit's decision in *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981) and its own earlier decision in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987), the Eleventh Circuit rejected this argument. The Court recognized, quoting the dissent in *Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688 (3d Cir. 1989), that such an interpretation would lead to injustice, oppression, and absurd consequences and would allow reservists "to play fast and loose with the system in a way that Congress could not have intended." Pet. App. 9a. A reasonableness requirement is necessary when considering anything other than "military training obligations lasting less than three months"[8] for the statutory scheme to work.[9]

The Third Circuit in *Eidukonis* adopted the reasonableness standard in evaluating extended leave requests under 2024(d). Plaintiff was dismissed by his employer after he

[8]*Monroe v. Standard Oil Co.*, 452 U.S. 549, 555 (1981).

[9]*See Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688 (3d Cir. 1989); *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987); *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981). Although Congress through section 2024(d) "intended to prevent discrimination in employment as a result of a reservist's military obligation . . . it did not intend thereby to endow a reservist with unreasonable powers over his employer or cause his employer unreasonable hardship." *Lee v. City of Pensacola*, 634 F.2d at 888 (quoting district court opinion). This Court, in considering whether an employer was required to adjust an employee's work schedule to make up for time lost because of military obligations, recognized in *Monroe* that the Act is not intended to and does not impose "additional obligations upon employers, guaranteeing that employee-reservists have the opportunity to work the same number of hours, or earn the same amount of pay that they would have earned without absences attributable to military reserve duties. . . . " 452 U.S. at 564.

failed to report to work upon the refusal of his employer to grant him an extension of his leave of absence. After exhaustively reviewing the legislative history of section 2024(d) the Third Circuit found "nothing in the legislative history of section 2024(d) to indicate that Congress contemplated that it was authorizing reservists to take leaves of unlimited duration for Reserve service." 873 F.2d at 693.

The application of a reasonableness standard to extended leave requests under 2024(d) is necessary to make the statute work. "This section was designed to provide reemployment protection for trainees who are absent from employment for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, and special training or instruction periods that may last for 30, 60 or 90 days." S. Rep. No. 1672, 86th Cong., 2d Sess. 2 *reprinted in* 1960 U.S. Code & Admin. News 3077, 3078. As the 1960 Senate Report recognized, "[a] period of 30 days [allowed in 2024(c)] within which to assert leave of absence rights by persons performing inactive duty training . . . is unrealistic." *Id.* Accordingly, to be entitled to 2024(d) protection, Congress required the employee to report for work at the beginning of the employee's next regularly scheduled work period. It is unrealistic to expect an employee reservist to report for work at the beginning of his next regularly scheduled working period after a hiatus of three years.

The Solicitor insists, however, that apart from the requirements that the reservist "request" the leave and return to work "at the beginning of [the] next regularly scheduled working period," there are "no conditions or limits on the assertion of reemployment rights following a tour of duty falling within [2024(d)'s] scope."[10] Pet. 14. The Army Guard

[10]The Department of the Army takes a different view in that it not only denied a leave request and cancelled the reservists orders, but also terminated a civilian employee/reservist because of his failure to "reasonably" request a leave of absence. *See Ellermets v. Department of Army*, 916 F.2d 702 (Fed. Cir. 1990).

Reserve Program provides for periods of active duty of up to five years and these periods of active duty may be renewed upon completion. 10 U.S.C. § 679(a) (1982). Consequently, under the Solicitor's view, a reservist could conceivably obtain leaves from his civilian employment for four five year tours, retire, and then expect to return to his civilian employment twenty years later and at his next regularly scheduled work period "with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes." 38 U.S.C. 2024(d). Such unrealistic and preferential treatment for reservists was not envisioned by Congress. This Court has previously recognized "that Congress did not intend employers to provide special benefits to employee-reservists not generally made available to other employees." *Monroe v. Standard Oil Company*, 452 U.S. 549, 561 (1981). Employers are to make a reasonable accommodation to employee-reservists requesting extended leaves under 2024(d) — not an absolute accommodation that grants reservists greater benefits and privileges than those available to other employees.

Kolkhorst's two week leave request clearly fell within the intended scope of 2024(d) and the Fourth Circuit's observation that no reasonableness standard applied to those facts was correct and consistent with other courts' application of 2024(d). The conflict urged by the Solicitor does not exist in fact. The Eleventh Circuit would reach the same decision in *Kolkhorst* as did the Fourth Circuit. Because no challenge to the length of a leave request was presented to the Fourth Circuit, it cannot be said with confidence that a different outcome "would have resulted . . . had the Fourth Circuit decided this case." Pet. 20. There can be no conflict *on the same matter* when the result in both cases is a correct application of 2024(d) protection. No review of the present case is warranted by this Court because there is no conflict in the Circuits over the nature of protection afforded by 2024(d).

2. This case does not present an important question of federal law warranting review by this Court.

Applying a reasonableness standard to extended leave requests under 2024(d) is not so appalling that review is called for by this Court. Lower courts have correctly and consistently applied a reasonableness standard to extended leave requests under 2024(d).[11] Each case turns mainly upon its own special facts and is of consequence primarily to the individual parties. Nevertheless, the Solicitor contends that reviewing each extended leave request to determine whether it is reasonable "creates an indeterminate and vague standard that generates uncertainty among employers and potential recruits" and that the three year bright-line rule established by the Eleventh Circuit in this case will "impair the ability of the reserves to fill . . . pivotal positions." Pet. 8. However, as demonstrated by the handful of cases in which a "reasonableness" determination has been requested, extended leaves under 2024(d) are uncommon and do not play a major role in reserve service.[12] King's three year leave request to serve as Command Sergeant Major in the

---

[11] *See, e.g., Lemmon v. Santa Cruz County, California*, 686 F. Supp. 797 (N.D. Cal. 1988) (initial ten month leave found reasonable under 2024(d)); *Barber v. Gulf Publishing Company, Inc.*, 122 L.R.R.M. (BNA) 2344 (S.D. Miss. 1986) (Five month leave reasonable); *Anthony v. Basic American Foods, Inc.*, 600 F. Supp. 352 (N.D. Cal. 1984) (Four and one-half month leave reasonable); *Green v. Spartan Stores, Inc.*, 112 L.R.R.M. (BNA) 2099 (W.D. Mich. 1982) (additional six week leave reasonable). There are only seven cases, other than this case, involving extended leave requests under 2024(d). These include the four district court opinions cited above and three Circuit Court opinions (*Eidukonis, Gulf States*, and *Lee*). Every case applied the "reasonableness" standard and in all but two cases (*Eidukonis* and *Lee*), the leave was found to be reasonable.

[12] Reemployment rights of National Guard and Reserve forces presently being called to active service as a result of the crisis in Saudi Arabia are not governed by 2024(d).

Alabama National Guard is unique. There are no other reported instances of such a lengthy request.[13] Moreover, the denial of King's three year leave request clearly did not "impair the ability of the reserves to fill" the Command Sergeant Major position since King testified that even had he been told that he would have no reemployment rights upon completion of his three year tour of duty, he would still have left his employment and taken the Command Sergeant Major position.

National Guard and Reserve members are full-time employees and part-time soldiers. St. Vincent's recognizes the essential role members of the National Guard and Reserve play in our national defense[14] and agrees that "[t]o fulfill mission requirements, National Guard and Reserve personnel must have the opportunity for meaningful and realistic training — *both at monthly inactive duty training drills and two weeks' active duty for training.*" H.R. Rep. No. 504, 99th Cong. 2d Session 2 (1986) (emphasis added). Congress has urged employers to cooperate with the Reserve services scheme and an interpretation of 2024(d) that gives employees the right to extended leave on demand without consideration of the legitimate needs of their employers is not productive to this spirit of cooperation. As recognized in Eidukonis, "while Congress expects employers to be patriotic, we do not believe that it expects them to forego all legitimate business concerns." 873 F.2d at 694. Allowing extended leaves on demand would frustrate the compromise established in the Veterans' Reemployment Rights Act between the obligations of a part-time soldier to his Government and full-time employee to his employer.

---

[13] *See infra* note 11.

[14] Act of May 2, 1986, Pub. L. No. 99-290, § 1(b), 100 Stat. 413.

Implicitly conceding that the legislative history in the form of the 1960 Senate Report evidences Congress' belief that at the time 2024(d) was enacted, it was to apply to leave requests lasting less than three months, the Solicitor urges that a "fundamental shift in the structure of the Nation's armed forces" and heavy reliance "on voluntary reservists as a critical component of the potential fighting force" justifies extended leaves under 2024(d). Pet. 14-15. The Solicitor points to Congress' authorization of new training programs and expansion of the number and type of positions to be filled by reservists as an indication of Congress' intent "beyond doubt" that 2024(d) benefits were to apply not only to leave requests of short duration, "but also for reservists in King's situation." Pet. 16-17. However, Congress' choice of the "unconditional language" now urged as encompassing these extended leaves occurred when these programs were not in existence and there is nothing in the legislative history of 2024(d) or in subsequent actions by Congress to support the argument that leaves of unlimited duration are mandated.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is due to be denied.

Respectfully submitted,

Harry L. Hopkins
Morris Wade Richardson

Attorneys for Respondent

January, 1991